No. 79-830

In the Supreme Court of the United States

OCTOBER TERM, 1979

CHARLES VINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 606 F. 2d 149.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1979. Mr. Justice Stewart extended the time for filing a petition for certiorari to and including November 26, 1979, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion by denying a severance motion.

2. Whether the district court abused its discretion by limiting cross-examination of a government witness concerning a collateral matter.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner and Arlie B. Thompson were convicted on two counts of extorting money and one count of conspiring to do so in violation of the Hobbs Act, 18 U.S.C. 1951.[1] Petitioner was sentenced to concurrent four-year terms of imprisonment on counts one and two, and to a 10-year term of imprisonment and $10,000 fine on count three. The term of imprisonment on count three was suspended, and petitioner was given a five-year term of probation to run consecutively to the imprisonment imposed on counts one and two. The court of appeals affirmed (Pet. App. 1a-11a).

1. The evidence established that petitioner, then the sheriff of Lawrence County, Kentucky, joined with co-defendant Thompson, a county magistrate, in a successful conspiracy to extort money from the Riverside Coal Company, which hauled coal through Lawrence County.

The scheme originated in the early part of 1978 when petitioner presented to Lindsey Davis, the county jailer, a plan to threaten coal haulers with official harrassment unless payoffs were forthcoming (A. 95-99). On April 6, 1978, petitioner and Davis met with James Williamson, vice president of Riverside Coal Company, at his office. Petitioner told Williamson that unless Riverside paid him 25 cents per ton of coal hauled through Lawrence

[1]Thompson has filed a separate petition for a writ of certiorari, No. 79-924, raising entirely distinct issues.

County he would "harass" Riverside's trucks and "see that you don't haul coal" (A. 35-40). Williamson replied that he would have to consult with his superiors before he could agree. After petitioner and Davis departed, Williamson informed his superiors, who in turn notified the F.B.I. (A. 40-43, 100-107).

Five days later, in a telephone conversation tape recorded by the F.B.I., Williamson arranged to meet petitioner to discuss the proposed extortion payments (A. 43-45). They met the next day at petitioner's office and proceeded to another location, where they met Davis. Petitioner repeated his threat that unless Riverside made payoffs to him he would harrass the company's trucks, explaining that he needed the money to pay his debts. Petitioner and Williamson agreed to reduce the rate of payment to 15 cents per ton for coal hauled from some mines and 10 cents per ton for coal hauled from others. They also decided that the payments would be picked up by Davis at an abandoned mine site (A. 57-62, 108-109). Shortly thereafter, Davis told Williamson and petitioner that he had decided not be involved further with the scheme (A. 63, 110-111).

In a tape-recorded conversation later that month, Williamson asked petitioner how he wanted payments to be made. Petitioner responded that Williamson should not call him any more; instead, he would contact Williamson (A. 65-66). On May 4, 1978, a woman called Williamson at his office and left a message instructing him to meet a man wearing red suspenders at a particular shopping center the next day. Williamson went to the shopping center at the designated hour, but no one approached him (A. 67-69, 90-93). Six days later, petitioner met Williamson at his office and arranged for a payment to be made on May 12 to co-defendant

Thompson, who would be waiting at the same shopping center wearing red suspenders. Williamson indicated that another representative of the company would make the payment in his place (A. 70-73). On the appointed day an F.B.I. agent, posing as Williamson's representative, delivered an envelope containing $1,200 to Thompson at the shopping center. The agent asked Thompson "if he was Sheriff Charlie Vinson's man * * * and he said he was" (A. 135). This transaction was photographed and tape-recorded by the F.B.I. (A. 73-74, 128-138).

On June 1, 1978, in another tape-recorded conversation, petitioner arranged with Williamson for a payoff to be made on June 6 in the same manner as the previous payment (A. 78-80). On June 6 the F.B.I. agent met Thompson at the shopping center and gave him $1,301 in an envelope bearing petitioner's name. This transaction was photographed and tape recorded (A. 144-150). Other F.B.I. agents then followed Thompson, arrested him and recovered the market payoff money from him. Petitioner was arrested that same day (Tr. 636, 641-643).

2. Thompson testified in his defense that at petitioner's request he picked up the envelopes on May 12 and June 6, 1978, but did not know their contents. Thompson also testified that he delivered the May 12 envelope to petitioner at his office at approximately 5:00 p.m. that same day (A. 184-190). Petitioner, in his defense, testified that he never asked Thompson to meet anyone or to pick up any package for him, and contradicted Thompson's testimony regarding the meeting and delivery of the envelope on May 12 (A. 191-193).

In rebuttal Thompson offered the testimony of two state troopers who said they saw Thompson meet with petitioner at his office on May 12 between 5:10 p.m. and 6:20 p.m. (A. 203-208).

ARGUMENT

1. Petitioner contends (Pet. 9-15) that he was denied a fair trial because the district court refused to sever his case from that of Thompson even though his and Thompson's defenses were contradictory and antagonistic. This claim was properly rejected by the court below.

It is well established that the trial court has broad discretion to grant or deny a severance, and its decision will not be disturbed unless that discretion is abused. See, *e.g.*, *Opper* v. *United States*, 348 U.S. 84, 95 (1954); *United States* v. *Tanner*, 471 F. 2d 128, 137 (7th Cir.), cert denied, 409 U.S. 949 (1972); *United States* v. *Finkelstein*, 526 F. 2d 517, 523 (2d Cir. 1975), cert. denied, 425 U.S. 960 (1976). As the court of appeals noted (Pet. App. 7a-8a), a trial judge need not sever co-defendants merely because each seeks to blame the other. See *United States* v. *Joyce*, 499 F. 2d 9, 21 (7th Cir.), cert. denied, 419 U.S. 1031 (1974); *United States* v. *Perez*, 489 F. 2d 51, 68 (5th Cir. 1973), cert. denied, 417 U.S. 945 (1974); United States v. *Troutman*, 458 F. 2d 217, 221 (10th Cir. 1972); *United States* v. *Barber*, 442 F. 2d 517, 529-530 (3d Cir.), cert. denied, 404 U.S. 846 (1971); *United States* v. *Hutul*, 416 F. 2d 607, 620-621 (7th Cir. 1969), cert. denied, 396 U.S. 1007 (1970); *Dauer* v. *United States*, 189 F. 2d 343, 344 (10th Cir.), cert. denied, 342 U.S. 898 (1951). Rather, severance is necessary only when defenses are mutually exclusive to the point that a fair resolution of guilt or innocence is precluded, and there is substantial danger "that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." *Rhone* v. *United States*, 365 F. 2d 980, 981 (D.C. Cir. 1966). See also *United States* v. *Ehrlichman*, 546 F. 2d 910, 929 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120 (1977).

A severance was not required under the facts of this case. Thompson's defense did not, of itself, attribute guilt to petitioner. Thompson merely asserted his own innocence, claiming that though he picked up envelopes for and delivered them to petitioner, he was unaware of their contents. Petitioner similarly did not attribute guilt to Thompson. He simply denied that he had ever asked for or received the envelopes in question. The conflict between the two men would have inculpated neither of them were it not for the physical evidence and testimony of other witnesses describing the extortion scheme and the roles petitioner and Thompson played in it. In fact, the testimony of Williamson, Davis, and the F.B.I. agents, and the tape recordings and photographs of the various transactions established a substantial basis for the jury's verdict wholly apart from the defendants' testimony. Hence there was little likelihood that the jury's verdict was due to an impermissible inference from conflicting defenses. In addition, petitioner had ample opportunity to cross-examine Thompson and does not allege that Thompson's testimony or any other evidence introduced at their joint trial would have been inadmissible against petitioner at a separate trial. In these circumstances, the court of appeals properly concluded that petitioner was not deprived of a fair trial by the denial of the severance motion. Further review of this fact-bound determination is unwarranted. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).[2]

[2]The cases upon which petitioner relies (Pet. 10-11) are inapposite. In *United States* v. *Crawford*, 581 F. 2d 489 (5th Cir. 1978), the police found a sawed-off shotgun partially hidden under the dashboard of a car in which the two co-defendants were riding. Each defendant presented evidence that the other owned the gun. Thus *Crawford*, unlike the instant case, involved directly cross-inculpatory defenses which in the absence of substantial independent evidence of guilt, as exists here, created the possibility that the jury unjustifiably would infer guilt from the conflict alone. In *United States* v. *Johnson*, 478 F. 2d 1129 (5th Cir. 1973), the complaining witness could not positively identify Johnson. Therefore, co-defendant Smith's testimony that Johnson was with him when counterfeit bills were passed was devastating to Johnson's defense that he was not present. The court ruled that failure to sever prejudiced Johnson because there was insufficient evidence to compel a finding of Johnson's guilt absent Smith's incriminating testimony. *Id.* at 1133. *United States* v. *Gambrill*, 449 F. 2d 1148 (D.C. Cir. 1971), reversed a conviction on grounds not relevant to this case. Moreover, the court did "not decide whether the failure to sever was reversible error." *Id.* at 1162. Instead the court of appeals, in the exercise of its discretion, ordered separate trials on remand to accomplish several objectives, among which was the avoidance of potential prejudice from antagonistic defenses. *Id.* at 1162-1163. Finally, the district court in *United States* v. *Valdes*, 262 F. Supp. 474 (D. P.R. 1967), simply acted within its discretion in granting a motion for severance. The case does not stand for the proposition that denial of the motion would have constituted an abuse of discretion.

2. Petitioner also contends (Pet. 15-20) that the district court improperly restricted his cross-examination of Davis as to whether he had sought to pay petitioner protection money as part of a scheme to sell marijuana in Lawrence County (A. 123). This claim lacks merit.

It is well established that the trial judge has broad discretion to control cross-examination about specific acts of misconduct (not resulting in a conviction) for the purpose of attacking a witness's credibility. See Fed. R. Evid. 608(b). See also *United States* v. *Estell*, 539 F. 2d 697, 699 (10th Cir. 1976). Whether Davis planned or participated in the alleged marijuana scheme was wholly collateral to the illegal extortion scheme for which petitioner was being tried. Had Davis denied involvement in the marijuana venture, petitioner would have been bound by the denial and could not have

contradicted it by extrinsic evidence. Fed. R. Evid. 608(b). Had Davis been involved in the scheme, he lawfully could have declined to answer the question, invoking his Fifth Amendment privilege against compelled self-incrimination. See, *e.g.*, *United States* v. *Norman*, 402 F. 2d 73, 76-77 (9th Cir. 1968), cert. denied, 397 U.S. 938 (1970); *Fountain* v. *United States*, 384 F. 2d 624, 627-629 (5th Cir. 1967), cert. denied, 390 U.S. 1005 (1968). Cf. *Namet* v. *United States*, 373 U.S. 179 (1963). Even an admission of prior misconduct would have had little, if any, impeachment value given petitioner's extensive cross-examination of Davis and Davis's admission that he had participated initially in the extortion scheme with which petitioner was charged. In sum, the court of appeals properly concluded that the district court did not abuse its considerable discretion by refusing to allow cross-examination on this purely collateral matter. See *United States* v. *Hastings*, 577 F. 2d 38, 40-42 (8th Cir. 1978); *United States* v. *Young*, 567 F. 2d 799, 803 (8th Cir. 1977), cert. denied, 434 U.S. 1079 (1978).[3]

[3]Petitioner's reliance (Pet. 17-20) upon *Davis* v. *Alaska*, 415 U.S. 308 (1974), is misplaced. In that case this Court distinguished between "a general attack" on a witness's credibility by showing specific acts of misconduct, as attempted here, and a "more particular attack" to show bias and prejudice on the part of a crucial government witness, as attempted there (*id.* at 316). The latter "is 'always relevant as discrediting the witness and affecting the weight of his testimony'. 3A J. Wigmore Evidence 940, p. 775 (Chadbourn rev. 1970)." *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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